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PATENT APPLICATION

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant	: EDWARD L. RAPP, ET AL.	Art Unit: 1794
Serial No.	: 10/615,249	Examiner: Helen F. Pratt
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Title	: TASTING ENERGY BAR (As Amended)	April 28, 2008

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Commissioner for Patents

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REPLY BRIEF

This brief is in reply to the Examiner's Answers dated February 28, 2008 and April 2, 2008 in the above-identified patent application. In the Examiner's Answer dated February 28, 2008, the Examiner indicated under section (6) that "[t]he appellant's statement of the grounds of rejection to be reviewed on appeal is correct." However, at page 10 of that same Answer the Examiner indicated that she was applying a new ground of rejection. The Answer dated April 2, 2008 now includes the indication of a new ground of rejection under section (6), although it appears the actual new ground of rejection is not set forth under that section, but is likely found at the last paragraph of page 5 under the heading "Detailed Action." In any event, pursuant to 37 CFR § 41.39(b)(2), Applicants hereby request that this appeal be maintained. An Appeal Brief was submitted on December 21, 2007.

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REPLY BRIEF

I. Real Party in Interest

The real party in interest is the assignee, Mars, Incorporated.

II. Related Appeals and Interferences

There are no related appeals or interferences.

III. Status of Claims

Claims 1-4, 6-8, and 10-24 stand non-finally rejected after the reopening of prosecution after Appeal Brief, and are under appeal. Claims 5 and 9 are cancelled.

IV. Status of Amendments

The claims have not been amended subsequent to the non-final rejection.

V. Summary of Claimed Subject Matter

Applicants' claimed invention is directed to energy bars that taste superior to other similarly categorized energy bars. (Page 6, lines 5-16). The invention is also directed to methods of making the energy bars of the invention. (Page 6, lines 17-29).

For the purposes of the invention, energy bars are food products that are shelf stable, in a portable form, and based on a 55 g serving size provide about 15 to about 45 g of carbohydrates, about 1 to about 4.5 g of fortification components (e.g., vitamins, minerals, antioxidants, amino acids, herb supplements, polyphenols, etc.), about 8 to about 40 g of protein, about 3 to about 8 g of fat, and about 150 to about 300

calories, and have a moisture content of less than about 15% by weight. (Page 4, line 29 to Page 5, line 4).

Prior to the claimed invention, energy bars were unappealing; the homogeneity of the extruded mass created bars lacking in desirable food-like properties. (Page 2, lines 17-24). Additionally, the haphazard combination of bad tasting but desirably nutritious ingredients (e.g., protein, vitamins, minerals, etc.) with other ingredients resulted in mediocre tasting products. (*Id.*). Furthermore, the inclusion of protein powders produced a mouth drying sensation. (Page 2, line 25 to Page 3, line 3).

The present invention overcomes these unappealing characteristics of energy bars without compromising on the healthful nutritional benefits of such bars by incorporating one or more of the following techniques: (1) processing process sensitive ingredients in a manner to preserve the integrity of the process sensitive ingredients by controlling the temperature and/or shear energy imparted on the process sensitive ingredients, (2) strategically positioning physiologically functional ingredients in the energy bar, (3) including a fat-carbohydrate matrix with the energy bar matrix, and (4) using protein powders having a particle size distribution such that at least 30 wt. % of the protein powder has a mean particle size of at least about 35 microns. (Page 6, lines 17-29). An ordinarily skilled artisan using such techniques set forth in the present specification may make energy bars (e.g., grain based or chewy energy bars) that have a hedonic score for consumer acceptability of at least about 4.9 based on a 7-point “acceptability scale,” where a score of 1 is equivalent to a rating of “Dislike Extremely,” and 7 is equivalent to a rating of “Like Extremely”. (Page 5, lines 15-22; Page 10, line 19 to Page 11, line 7).

In the embodiment of the invention recited in appealed claim 1, the energy bar has a mean hedonic score for consumer acceptability of at least about 5.2, about 15 to about 45 g of carbohydrates, about 1 to about 4.5 g of fortification components, about 8 to about 40 g of protein, about 3 to about 8 g of fat, about 150 to about 300 calories, and a moisture content of less than about 15% by weight, based on a 55 gram serving size.

(Page 4, line 29 to Page 5, line 4). The carbohydrates are selected from the group consisting of starch, sugar, gels, syrups, honey, molasses, and combinations thereof.

(Page 14, lines 3-5). The fortification components are selected from the group consisting of vitamins, minerals, and combinations thereof. (Page 17, lines 15-17). The protein is selected from the group consisting of whey protein, milk protein, egg protein, casein, peanut flour, nut meats, vegetable protein, and combinations thereof. (Page 21, lines 15-19). The fat is selected from the group consisting of chocolate, peanut butter, fat substitutes, vegetable fats, tropical fats, animal fats, and combinations thereof. (Page 14, lines 1-3).

In the embodiment of the invention recited in appealed claim 3, the grain based energy bar has a mean hedonic score for consumer acceptability of at least about 5.2, about 15 to about 45 g of carbohydrates, about 1 to about 4.5 g of fortification components, about 8 to about 40 g of protein, about 3 to about 8 g of fat, about 150 to about 300 calories, and a moisture content of less than about 15% by weight, based on a 55 gram serving size. (Page 4, line 29 to Page 5, line 4; Page 10, lines 7-19; Page 11, lines 5-7). The carbohydrates are selected from the group consisting of starch, sugar, gels, syrups, honey, molasses, and combinations thereof. (Page 14, lines 3-5). The fortification components are selected from the group consisting of vitamins, minerals,

and combinations thereof. (Page 17, lines 15-17). The protein is selected from the group consisting of whey protein, milk protein, egg protein, casein, peanut flour, nut meats, vegetable protein, and combinations thereof. (Page 21, lines 15-19). The fat is selected from the group consisting of chocolate, peanut butter, fat substitutes, vegetable fats, tropical fats, animal fats, and combinations thereof. (Page 14, lines 1-3).

In the embodiment of the invention recited in appealed claim 7, the chewy based energy bar has a mean hedonic score for consumer acceptability of at least about 4.9, about 15 to about 45 g of carbohydrates, about 1 to about 4.5 g of fortification components, about 8 to about 40 g of protein, about 3 to about 8 g of fat, about 150 to about 300 calories, and a moisture content of less than about 15% by weight, based on a 55 gram serving size. (Page 4, line 29 to Page 5, line 4; Page 10, lines 7-19; Page 11, lines 1-4). The carbohydrates are selected from the group consisting of starch, sugar, gels, syrups, honey, molasses, and combinations thereof. (Page 14, lines 3-5). The fortification components are selected from the group consisting of vitamins, minerals, and combinations thereof. (Page 17, lines 15-17). The protein is selected from the group consisting of whey protein, milk protein, egg protein, casein, peanut flour, nut meats, vegetable protein, and combinations thereof. (Page 21, lines 15-19). The fat is selected from the group consisting of chocolate, peanut butter, fat substitutes, vegetable fats, tropical fats, animal fats, and combinations thereof. (Page 14, lines 1-3).

In the embodiment of the invention recited in appealed claim 14, the energy bar is made by a process comprising the steps of (a) mixing one or more solid components and one or more carbohydrate based syrups to form an energy bar matrix; (b) mixing the energy bar matrix with a fat-carbohydrate matrix to form an enhanced

energy bar matrix, wherein the fat-carbohydrate matrix is comprised of one or more fats and one or more carbohydrate components, and (c) forming the enhanced energy bar matrix into the energy bar, wherein the energy bar has a lubricious mouthfeel. (Page 4, lines 3-9; Page 29, lines 13-19). The energy bar must have about 15 to about 45 g of carbohydrates, about 1 to about 4.5 g of fortification components, about 8 to about 40 g of protein, about 3 to about 8 g of fat, about 150 to about 300 calories, and a moisture content of less than about 15% by weight, based on a 55 g serving size. (Page 4, line 29 to Page 5, line 4). The carbohydrates are selected from the group consisting of starch, sugar, gels, syrups, honey, molasses, and combinations thereof, the fortification components are selected from the group consisting of vitamins, minerals, and combinations thereof, the protein is selected from the group consisting of whey protein, milk protein, egg protein, casein, peanut flour, nut meats, vegetable protein, and combinations thereof, and the fat is selected from the group consisting of chocolate, peanut butter, fat substitutes, vegetable fats, tropical fats, animal fats and combinations thereof. (Page 14, lines 1-4; Page 17, lines 15-17; Page 21, lines 15-19).

The embodiment of the invention recited in appealed claim 16 is a method of making an energy bar comprising the steps of (a) mixing one or more solid components and one or more carbohydrate based syrups to form an energy bar matrix; (b) mixing the energy bar matrix with a fat-carbohydrate matrix to form an enhanced energy bar matrix, wherein the fat-carbohydrate matrix is comprised of one or more fats and one or more carbohydrate components, and (c) forming the enhanced energy bar matrix into the energy bar, wherein the energy bar has a lubricious mouthfeel. (Page 4, lines 10-16; Page 29, lines 13-19). The resulting energy bar must have about 15 to about

45 g of carbohydrates, about 1 to about 4.5 g of fortification components, about 8 to about 40 g of protein, about 3 to about 8 g of fat, about 150 to about 300 calories, and a moisture content of less than about 15% by weight, based on a 55 g serving size. (Page 4, line 29 to Page 5, line 4). The carbohydrates are selected from the group consisting of starch, sugar, gels, syrups, honey, molasses, and combinations thereof, the fortification components are selected from the group consisting of vitamins, minerals, and combinations thereof, the protein is selected from the group consisting of whey protein, milk protein, egg protein, casein, peanut flour, nut meats, vegetable protein, and combinations thereof, and the fat is selected from the group consisting of chocolate, peanut butter, fat substitutes, vegetable fats, tropical fats, animal fats and combinations thereof. (Page 14, lines 1-4; Page 17, lines 15-17; Page 21, lines 15-19).

The embodiment of the invention recited in appealed claim 18 is a method for improving the mean hedonic score of an energy bar, comprising one or more of the following steps: (a) processing process sensitive ingredients in a manner to preserve the integrity of said process sensitive ingredients by controlling the temperature and/or shear energy imparted on said process sensitive ingredients; (b) including a fat-carbohydrate matrix with an energy bar matrix; and (c) using protein powders that have a particle size distribution such that at least about 30 wt.% of said protein powder has a mean particle size of at least about 35 microns. (Page 4, lines 17-25; Page 6, lines 17-29). Again, the energy bar must have about 15 to about 45 g of carbohydrates, about 1 to about 4.5 g of fortification components, about 8 to about 40 g of protein, about 3 to about 8 g of fat, about 150 to about 300 calories, and a moisture content of less than about 15% by weight, based on a 55 g serving size. (Page 4, line 29 to Page 5, line 4). In addition, the

carbohydrates are selected from the group consisting of starch, sugar, gels, syrups, honey, molasses, and combinations thereof, the fortification components are selected from the group consisting of vitamins, minerals, and combinations thereof, the protein is selected from the group consisting of whey protein, milk protein, egg protein, casein, peanut flour, nut meats, vegetable protein, and combinations thereof, and the fat is selected from the group consisting of chocolate, peanut butter, fat substitutes, vegetable fats, tropical fats, animal fats and combinations thereof. (Page 14, lines 1-4; Page 17, lines 15-17; Page 21, lines 15-19).

The energy bar recited in claim 21 has a mean hedonic score for consumer acceptability of at least about 5.2, wherein said energy bar has about 15 to about 45 g of carbohydrates, about 1 to about 4.5 g of fortification components, about 8 to about 40 g of protein, about 3 to about 8 g of fat, about 150 to about 300 calories, and a moisture content of less than about 15% by weight, based on a 55 g serving size. (Page 4, line 29 to Page 5, line 4; Page 10, lines 19-20). In addition, the energy bar is comprised of an energy bar matrix combined with a fat-carbohydrate matrix in a weight ratio of about 99:1 to about 80:20. (Page 13, line 20; Page 14, lines 14-18). The energy bar matrix is comprised of a solid component selected from the group consisting of corn starch, oat, rice, wheat, barley, cereal, grains, sorghum, protein, salt, flavors, cocoa powder, flour, fortification components, sugars, and combinations thereof, and a carbohydrate based syrup selected from the group consisting of corn syrups, liquid sucrose, honey, high fructose corn syrup, glycerin, and combinations thereof. (Page 12, line 23 to Page 13, line 8). The fat-carbohydrate matrix is comprised of about 2 wt.% to about 25 wt.% of one or more fat components selected from the group consisting of chocolate, peanut

butter, fat substitutes, vegetable fats, tropical fats, animal fats and combinations thereof, and about 10 wt. % to about 75 wt. % of one or more carbohydrate components selected from the group consisting of starch, sugar, gels, syrups, honey, molasses, and combinations thereof. (Page 13, line 20 to Page 14, line 13). Further, the carbohydrates are selected from the group consisting of starch, sugar, gels, syrups, honey, molasses, and combinations thereof, the fortification components are selected from the group consisting of vitamins, minerals, and combinations thereof, the protein is selected from the group consisting of whey protein, milk protein, egg protein, casein, peanut flour, nut meats, vegetable protein, and combinations thereof, and the fat is selected from the group consisting of chocolate, peanut butter, fat substitutes, vegetable fats, tropical fats, animal fats and combinations thereof. (Page 14, lines 1-5; Page 17, lines 15-17; Page 21, lines 15-19).

The energy bar recited in claim 22 has a mean hedonic score for consumer acceptability of at least about 5.2, about 15 to about 45 g of carbohydrates, about 1 to about 4.5 g of fortification components, about 8 to about 40 g of protein, about 3 to about 8 g of fat, about 150 to about 300 calories, and a moisture content of less than about 15% by weight, based on a 55 g serving size. (Page 4, line 29 to Page 5, line 4; Page 6, lines 12-16; Page 10, lines 19-26). Significantly, the protein is comprised of protein powder and at least 30 wt. % of the protein powder has a mean particle size of at least about 35 microns. (Page 21, lines 24-30). Again, the carbohydrates are selected from the group consisting of starch, sugar, gels, syrups, honey, molasses, and combinations thereof, the fortification components are selected from the group consisting of vitamins, minerals, and combinations thereof, the protein is selected from the group consisting of whey

protein, milk protein, egg protein, casein, peanut flour, nut meats, vegetable protein, and combinations thereof, and the fat is selected from the group consisting of chocolate, peanut butter, fat substitutes, vegetable fats, tropical fats, animal fats and combinations thereof. (Page 14, lines 1-4; Page 17, lines 15-17; Page 21, lines 15-19).

Furthermore, as recited in claim 23, the protein powder is selected from the group consisting of animal protein, plant protein, whey protein, soy protein, milk protein, egg protein, casein, peanut flour, nut meats, and combinations thereof. (Page 21, lines 15-19). As recited in claim 24, the protein powder has a particle size distribution such that at least 50% of the particles have a mean particle diameter in the range from about 35 to about 175 microns and less than 10% of the particles have a mean particle diameter in the range from about 10 to about 50 microns. (Page 21, line 24 to Page 22, line 27).

VI. Grounds of Rejection To Be Reviewed On Appeal

1. Whether claims 1-4, 6-8, and 10-24 are not enabled under 35 U.S.C. §112, first paragraph?
2. Whether claims 1-4, 6-8, 10, and 13-22 are obvious under 35 U.S.C. §103 over U.S. Patent No. 4,055,669 (Kelly) in view of U.S. Patent No. 6,592,915 (Froseth)?
3. Whether claims 11 and 12 are obvious under 35 U.S.C. §103 over U.S. Patent No. 4,055,669 (Kelly) in view of U.S. Patent No. 6,592,915 (Froseth) and further in view of Rombauer, I., et al., Joy of Cooking, The Bobbs-Merrill Co., Inc., MacMillan, Inc., N.Y., 1986, pages 705, 708 (Rombauer)?

4. Whether claims 23 and 24 are obvious under 35 U.S.C. §103 over Kelly in view of Froseth, and U.S. Patent No. 3,615,590 (Avera)?

5. Whether claims 1-4, 6-8, and 10-24 are not obvious in view of objective indicia?

VII. Argument

A. The Examiner's Reasoning Does Not Support the Rejection of the Claims as Not Enabled

The Examiner ignores the definition of “fortification components” provided in the specification (*see e.g.* paragraph [0016] on pp. 4-5; paragraph [0018] on p. 5; and paragraph [0044] on p. 12) and asserts that the specification is enabling for about 1 to about 4.5 g of fortification components, but allegedly does not provide enablement for about 1 to about 4.5 g of vitamins and minerals. The Examiner's reasoning that “because vitamins and minerals often have effects on the taste and flavor of the composition by causing off-tastes and off-flavors, and no basis is seen for adding particular amounts of 1-4.5 g. of vitamins and minerals” (Examiner's Answer dated April 2, 2008 (“Examiner's 2nd Answer”), p. 12) is flawed and without merit.

The question is whether one of ordinary skill could make or use the claimed invention based on the patent disclosure and that known in the art. The present invention is clearly directed to making improved tasting energy bars and it was well known that energy bars contained “high levels of protein, vitamins and minerals, in a low fat bar.” (Specification, paragraph [0003] on p. 2). As noted above, the specification states that the energy bar of the invention includes fortification components in an amount of 1 to 4.5 grams and that fortification components include vitamins and minerals. In fact one of ordinary skill would clearly understand that the whole point of the application and techniques disclosed therein was to provide “a truly good tasting energy bar that delivers healthful nutritional benefits, i.e., high protein, fortified with vitamins and minerals, and low in fat.” (Specification, paragraph [0009] on p. 3). Accordingly, for the Examiner to

assert that the claim directed to an energy bar having 1 to 4.5 grams of vitamins and minerals is not enabled is truly incomprehensible.

It is clear that the significant advance of providing an improved tasting energy bar despite high levels of protein, minerals and vitamins in a low fat environment remains unrecognized by the Examiner. It should be noted that the claims were amended to specifically recite vitamins and minerals as the fortification ingredients on May 8, 2006. This change was made after discussing the merit of such a limitation in the interview of March 23, 2006 with the Examiner. Two subsequent office actions were received in which no enablement rejection was made. In fact, the enablement rejection was not even raised until after Applicants filed their Appeal Brief. Its withdrawal is respectfully requested.

B. The Examiner's New Ground of Rejection Is Far From Clear

The Examiner originally rejected claims 1-4, 6-8, 10-22 as allegedly obvious over Kelly (U.S. Patent No. 4,055,669) in view of Froseth (U.S. Patent No. 6,592,915) and Rombauer. (*See* Office Action dated August 10, 2007). The Examiner's Answer of April 2, 2008 states at page 3, under "NEW GROUND(S) OF REJECTION" that "over the prosecution of the application, it is seen that claims 1-10 did not require Rombauer as in the first rejection." A rejection is then set out for claims 11 and 12 based on Kelly in view of Froseth and further in view of Rombauer. This rejection of claims 11 and 12, however, is clearly not new.¹

¹ The Examiner acknowledges this is the same rejection as in the last Office Action. Examiner's Answer dated Apr. 2, 2008 ("Examiner's 2nd Answer"), at p. 3 ("[c]laims 11 and 12 were found in the original rejection of Kelly et al. in view of Froseth et al. and Rombauer et al."). If the rejection is indeed the same as in the last Office Action, it is

What, in fact, appears to be new is the rejection set forth at page 5 of the Examiner's 2nd Answer, which indicates that claims 1-4, 6-8, 10 and 13-22 are rejected as allegedly obvious over Kelly in view of Froseth. It is noted above, however, that the Examiner indicated under the new ground of rejection heading that it is claims 1-10 that did not require Rombauer. No mention was made that claims 13-22 did not require Rombauer, although Rombauer is not now recited. To further add to the confusion, the Examiner continues to rely on Rombauer in her detailed discussion of her rejection of claims 14-16 and 18-20 at page 10 of the Examiner's 2nd Answer.

The lack of clarity surrounding the new ground(s) of rejection is particularly striking considering that three of the Examiner's colleagues read and signed off on this Examiner's 2nd Answer. Nonetheless, Applicants assume that for the purposes of this appeal the new ground of rejection was meant to recite that claims 1-4, 6-8, 10 and 13-22 are rejected as allegedly obvious over Kelly in view of Froseth. That rejection is hereby traversed.

unclear what is "new" about this ground of rejection. If the Examiner refers to the obviousness rejection of claims 1-10 over Kelly in view of Froseth as the "new" ground of rejection, it is unclear why those rejections were not discussed under the subheading "new grounds of rejection" on page 3 of the Examiner's 2nd Answer, but were instead discussed on page 5, where they were not prominently identified as such. Therefore, in addition to being unclear, the new grounds of rejection also do not meet the MPEP's requirements for a new ground of rejection in an examiner's answer. *See* MPEP § 1207.03 I. ("Any new ground of rejection made by an examiner in an answer must be: . . . (B) prominently identified in . . . the 'Grounds of Rejection' section of the answer . . .").

C. The Rejection of Claims 1-4, 6-8, 10 and 13-22 As
Allegedly Obvious over Kelly in View of Froseth,
With Or Without Rombauer Is Not Sustainable

There are significant differences between the claimed inventions and the food products described in Kelly and Froseth. As discussed in Applicants' Brief dated December 21, 2007 ("Opening Brief"), none of the food products of these references have the nutritional values required to be an energy bar. Thus, they do not face the problem of providing a food product having high levels of protein, minerals and vitamins in a low fat but good tasting product. That which does not recognize the problem cannot suggest a solution thereto. In summary, the Applicants traverse this new ground of rejection for all the reasons set forth in the Opening Brief because clearly if these claims are not obvious over Kelly in view of Froseth and Rombauer then they cannot be obvious over Kelly in view of Froseth.

The present invention is directed to energy bars having highly desirable taste characteristics and processes for manufacturing such energy bars. Significantly, the energy bars of this invention have been defined by claim specified nutritional parameters. Food products that meet this definition of energy bars have always been difficult to formulate without compromising taste. Nothing in Kelly, Froseth, or Rombauer, either alone or together, would allow one skilled in the art to make an energy bar with the claimed nutritional ingredients in the claimed range. The Examiner's contrary conclusions: (i) misconstrue the cited art; (ii) are based on a fundamental misunderstanding of the present invention, indicating dismissal of expert testimony regarding the present invention and the cited art; and (iii) ignore expert testimony regarding the objective indicia of nonobviousness. Only by misunderstanding the present

invention, misconstruing the cited art and ignoring the objective indicia of nonobviousness presented does the Examiner maintain that the present claims are obvious.

1. The Examiner Misconstrues The Cited Art

A plain reading of the cited art shows that Kelly, Froseth, Rombauer and Avera are neither directed toward energy bars nor do they describe the manufacture of an energy bar. For instance, Kelly discloses breakfast bars comprising a binder that includes a protein source coated with an edible fat (which masks the protein flavor and makes the binder taste bland), wherein the binder may comprise fortification components (e.g., vitamins and minerals), and is subject to high shear. Kelly, col. 2, ll. 24-27, 33-39; col. 3, ll. 6-14; col. 4, ll. 11-42; col. 5, ll. 40-42. However, the fat content of the breakfast bars in Kelly is 11 g, which is 25% above the upper range of 8 g of fat permitted in the claimed energy bars. First Declaration of Edward Rapp Dated May 8, 2006 (“Rapp Declaration I”), ¶ 10. In fact, Kelly touted the use of fat to overcome the negative taste and mouthfeel that results from high levels of protein and fortification components, stating: “[T]he individual particles of protein and carbohydrate contained in the binder composition are substantially coated with fat. The fat component . . . masks the otherwise adverse effect of the protein flavor.” Kelly, col. 3, ll. 6-14 (emphasis added).

No guidance is provided in Kelly as to the effects of shear and temperature on fortification components, e.g., vitamins and minerals. However, the Examiner asserts that, “Certainly, it would have been within the skill of the ordinary worker to not ruin ingredients by over mixing.” Examiner’s 2nd Answer, p. 15. The Examiner seems to ignore the fact that Kelly actually teaches away from the present invention by suggesting

that the binder composition be subject to an “agitator operated at high speed” during processing. Kelly, col. 4, ll. 11-42. “A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant.” *Tec Air, Inc. v. Denso Manufacturing Michigan, Inc.*, 192 F.3d 1353, 1360 (Fed. Cir. 1999) (quoting *In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994)); *see also Ecolochem, Inc. v. S. Cal. Edison Co.*, 227 F.3d 1361, 1372-73 (Fed. Cir. 2000) (reversed a finding that claims were obvious because the district court improperly discounted that the prior art taught away from the claimed invention); *W.L. Gore & Assoc., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1550 (Fed. Cir. 1983) (“disclosures in the references that diverge from and teach away from the invention at hand” must be considered).

Further, there is no reference in Kelly of using a protein powder having the particle size distribution of claims 6, 10, and 22, wherein at least 30 wt. % of the protein powder has a mean particle size of at least about 35 microns. Despite this fact, the Examiner attempts to fill in this glaring gap in protein particle size by asserting that in Kelly “[t]he protein powder is sodium caseinate, which has been rolled with other ingredients to the size of 50 microns The protein powders *would have had to be* about the claimed caseinate size of at least 35 microns since all the ingredients are 50 microns.” Examiner’s 2nd Answer, p. 6 (citing Kelly, col. 6, ll. 29-60) (emphasis added). That assertion is mere conjecture and speculation, based on improper, retrospective view of seemingly alleged inherency instead of asserting an explicit or implicit teaching or suggestion in the prior art. *In re Rijckaert*, 9 F.3d 1531, 1533-34 (Fed. Cir. 1993); *see In*

re Oelrich, 666 F.2d 578, 581 (C.C.P.A. 1981) (the mere fact that a certain thing may result is insufficient to establish inherency); *see also Glaxo v. Novopharm Ltd.*, 52 F.3d 1043, 1047-48 (Fed. Cir. 1995).

Also, there is no evidence that the particle size of sodium caseinate in Kelly prior to forming a mixture with other ingredients intrinsically meets the claimed limitation. The Examiner's assertion that "once the Examiner has made this statement the burden is on the Appellants to show that this is not so" (Examiner's 2nd Answer, p. 16) is plainly mistaken. First, to rely on an alleged characteristic in making a rejection based on anticipation or obviousness, it is the Examiner's burden to provide a basis in fact and/or technical reasoning to support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art. *Ex parte Levy*, 17 USPQ2d 1461, 1464 (Bd. Pat. App. & Inter. 1990). Second, Applicants provided an example whereby the protein powder could be less than 35 microns, and pointed out that Kelly provides no means of determining the particle size distribution of the protein disclosed therein. Preliminary Amendment dated Nov. 22, 2005, pp. 13-14. Third, the Examiner's assertion that Applicants "could surely find out what the general size of such powders used in candy bars and energy bars is" (Examiner's 2nd Answer, p. 16) totally misses the point of the invention. Not only are the cited art not energy bars as claimed, but also the present invention is based, in part, on the exceptional and surprising properties achieved by engineering the mean particle diameter of a protein powder, which the Examiner seems to ignore. Specification, p. 21, para. [0085], ll. 24-30. *See In re Soni*, 54 F.3d 750, 751 (Fed. Cir. 1995) (holding that the Board of Patent Appeals and Interferences erred in maintaining the Examiner's rejection of the claims as obvious

because unexpected results is established when Applicant demonstrates substantially improved results, states that the results were unexpected, and there is no evidence to the contrary).

The Examiner also misconstrues Froseth, which is directed to a cereal bar having at least two cereal layers and at least one visible filling layer, wherein the cereal layers further comprise a binder to hold identifiable ready-to-eat cereal pieces together. Froseth, col. 1, ll. 54-57; col. 2, ll. 3-7. Froseth is not an energy bar as claimed and contains only 0.66 g of fortification components, which is 44% below the required range of about 1 to about 4.5 g as set forth in the present claims. Rapp Declaration I, ¶ 11. Also, as explained by Mr. Rapp, simply adding fortification components, such as, vitamins, and minerals, would cause a significant detriment to the taste of the product. *Id.* at ¶ 15.

In addition, no reference is made in Froseth regarding the effects of shear and temperature on fortification components, and in fact, Froseth teaches away from the present invention by encouraging the use of high shear processes on fortification components. However, the Examiner asserts that, “Certainly, it would have been within the skill of the ordinary worker to not ruin ingredients by over mixing.” Examiner’s 2nd Answer, p. 16. The Examiner seems to ignore the fact that Froseth actually suggests that macronutrients (e.g., vitamins and minerals) can be added in the process of making its disclosed binder “at any time in the process” and that the binder may be mixed with a high-speed mixer. Froseth, col. 14, ll. 19-20, 61-64; col. 15, l. 62 to col. 16, l. 4. The Examiner asserts that, “Adding the heat sensitive ingredients at the end of the process of course, lessens the amount of shear imparted to the ingredients.” Examiner’s 2nd Answer,

p. 16. However, because there is no heat sensitive issue with respect to Kelly, Froseth does not suggest avoiding high shear in preparing the composition of Kelly. In addition, Froseth still does not teach the present invention as Froseth does not preclude adding a fortification component to a binder mixed with a high-speed mixer. The Examiner also seems to ignore the fact that Froseth does not preclude subjecting fortification ingredients to high temperatures as Froseth suggests that the binder “can be kept at any suitable temperature.” Froseth, col. 15, ll. 57-58. Thus, Froseth does not provide guidance regarding the impact of shear and temperature on fortification ingredients.

Similarly, the Examiner misconstrues Rombauer, which is directed to Pfeffernusse balls. Rombauer, p. 708, col. 1. Rombauer does not contain any fortification components and lacks significant protein. Rapp Declaration I, ¶¶ 12-13. Despite this fact, the Examiner considers the Pfeffernusse balls to be “an energy bar, since it is well known that carbohydrates such as corn syrup provide quick energy. *Fat also is the storage form of carbohydrates* and provides energy.” Examiner’s 2nd Answer, p. 10 (emphasis added). First, the Examiner’s statement that fat is a form of carbohydrate is scientifically inaccurate. Second, Rombauer is so far removed from the energy bar category that its citation by the Examiner is clear evidence that the Examiner has failed to recognize the significance of the presently claimed energy bar category and the extraordinary hurdles that needed to be overcome to provide an excellent tasting energy bar.

Despite evidence to the contrary provided by the Applicants clearly showing that the food products of the cited art are not energy bars, and hence it is moot to argue whether the products of the combined references taste good, the Examiner

continues to assert that “the claimed ingredients are all known, as is the process, whatever, the product is called.” *Id.* at p. 15. The Examiner is incorrect and has provided no reasonable basis for her assertion and continues to ignore the evidence provided regarding other commercial energy bars, which do meet the nutritional requirements of an energy bar of the invention, but still have lower hedonic scores, indicating that they do not taste as good. *See* Specification, para. [0035], p. 9, l. 27 to para. [0036], p. 10, l. 18; Rapp Declaration I, ¶15 (stating that the hedonic scores of POWERBAR® and LUNA® are only 4.78 and 5.06, respectively).

As discussed in the Opening Brief, the cited references are not analogous art, there is no motivation to combine the references, and even if combined, they do not teach or suggest all the claim limitations of claims 1-4, 6-8, and 10-24. Opening Brief, pp. 15-28. However, in asserting the new ground of rejection and/or maintaining the obviousness rejections the Examiner has not only failed to provide any explicit reasons for the rejections, but has made conclusory statements throughout the Examiner’s 2nd Answer regarding the rationale for combining the cited references. This is clearly contrary to the established legal requirement for an obviousness analysis. *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (stating that, “Rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness”); *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 722 (2007) (quoting Federal Circuit statement with approval). The Examiner asserts that “each reference is used for what it teaches and is combined for the reasons stated in the office action.” Examiner’ 2nd Answer, p. 12 (emphasis added). First, it is unclear which “office action”

the Examiner is referring to. Second, besides noting the Examiner's conclusory statements that begin with the phrase "[t]herefore, it would have been obvious" without actually providing any reasonable basis or explanation for the conclusion, Applicants are unable to find the reasons provided for combining the cited references in the Examiner's 2nd Answer.

Also, while attempting to explain the applicability of the Kelly reference to the present invention despite the fact that it does not disclose the claimed ingredients in the claimed ranges, the Examiner cites to "Froseth et al. (col. 26, lines 49-56)" for the proposition that, "Even if the claimed ingredients are not exactly as claimed, it would have been obvious to vary amounts and ingredients as in using various recipes as the function of each ingredient is known (Froseth et al. (col. 26, lines 49-56))." Examiner's 2nd Answer, p. 8 (emphasis added). First, Applicants are unable to find lines 53-56 on column 26 of Froseth as they do not exist. Second, the remaining cited portion of Froseth merely recites the water activity of the cereal bar of Froseth and does not appear relevant to the Examiner's proposition stated above. Third, even if the Examiner meant to cite to Kelly instead, Kelly does not contain 26 columns.

2. The Examiner Ignores Expert Testimony Regarding The Cited Art

Fundamental to the Examiner's erroneous assertion that Kelly in combination with the other cited art disclose the energy bar and the process of making the energy bar of the present invention is the failure of the Examiner to recognize that energy bars are a food category segment. Applicants, through expert testimony, explained that the cited references do not meet the definition of energy bars and that it has always been difficult to formulate such energy bars without compromising taste.

Expert testimony by Mr. Rapp confirms that the Examiner misconstrues the cited references. For instance, Mr. Rapp makes clear, based on facts and unchallenged scientific principles, that the food composition of Kelly *cannot* result in an energy bar of the present invention due to its higher than permissible fat content. *See* Rapp Declaration I, ¶¶ 8, 10, 14. The Examiner, however, ignores Mr. Rapp’s analysis on the basis that “nothing inventive is seen in using 2 grams less of fat as the outcome is known, of using less fat” and that “it would have been obvious to vary the amounts as shown by countless recipe books and the references.” Examiner’s 2nd Answer, p. 13. That is untenable. Mr. Rapp has made clear that “higher amounts of fat can be used to mask or cover up the negative taste” of other ingredients, such as, protein and fortification ingredients, however, this would result in a product that does not have the low fat and low calorie content of the energy bars of the present invention. *See* Rapp Declaration I, ¶¶ 8, 10, 18.

Mr. Rapp also makes clear through detailed scientific calculations that Froseth *cannot* result in an energy bar of the present invention due to its lower than permissible level of fortification components. *See id.* at ¶¶ 8, 11, 14, 16. The Examiner, however, ignores Mr. Rapp’s analysis on the basis that amended claim 1 requires vitamins and minerals, which the claims allegedly do not enable, and that Froseth mentions “adding more than calcium to the binder in the way of vitamins and minerals in amounts equal to a serving of cereal and milk (col. 26, lines 5-10).” Examiner’s 2nd Answer, p. 13. First, as explained in Section A above, the Examiner’s enablement rejection is clearly without any reasonable basis. Second, to reach the above conclusion, the Examiner cropped and misinterpreted a quote from Froseth. When the full context of

Froseth is considered, it is clear that the “total calcium, vitamin, mineral *and protein* level [is] equal to or greater than” that of a single serving of cereal and milk, with the *protein content being about 6 g.* Froseth, col. 26, ll. 5-10 (emphasis added). The quote from Froseth in relevant part states, “[T]he non-cooked cereal bar has a total calcium, vitamin, mineral and protein level equal to or greater than the calcium, vitamin, mineral and protein level of a single serving of ready-to-eat cereal and milk, further wherein the cereal bar has a protein content of about six (6) g.” *Id.*

Indeed, it is clear that it is not the total amounts of individual “vitamins and minerals” or even the total amount of “vitamins and minerals” of the Froseth cereal bar that are greater than or equal to that of a serving of cereal and milk as asserted by the Examiner, but the total amount of vitamins, minerals, calcium and protein that is greater or equivalent, with the protein content alone being about 6 g. In fact, the individual or combined levels of vitamins, minerals and calcium of the Froseth cereal bar may be less than those of a serving of cereal and milk. In addition, this quote from Froseth also makes clear that the protein content of the Froseth cereal bar is below the lower limit of 8 g claimed in the present energy bar. Thus, the Froseth cereal bar is not an energy bar as defined in the present invention.

The Examiner implicitly admits that the Pfeffernusse balls of Rombauer do not contain the claimed amounts of protein and contain no fortification components. *See Examiner’s 2nd Answer*, p. 13. The Examiner then asserts that this is irrelevant as Kelly discloses the claimed amounts. *Id.* However, as explained above with regards to the Kelly reference, the fat content of the food product of Kelly is much higher than the claimed range of the present invention.

Mr. Rapp explained that even if the missing fortification and/or protein were added to the cited art, it would not produce a food product that tastes good as evidenced by the lower hedonic scores of the competing products. *See* Rapp Declaration I, ¶¶ 15-19. For example, Mr. Rapp explained that increasing the protein content of the Pfeffernusse balls of Rombauer by 74% and adding 1 g of fortification components would severely impact the product's taste and not meet the hedonic score requirements of the present invention. *See id.* at ¶¶ 8, 12, 14, 17. The Examiner, however, incorrectly ignores Mr. Rapp's assessment and merely repeats, without any reasonable basis that "Appellants' claims are to compositions and a process whose ingredients have been shown as known or that it is obvious to combine such ingredients." Examiner's 2nd Answer, p. 14. *In re Rinehart*, 531 F.2d 1048, 1053-54 (C.C.P.A. 1976) (reversing a rejection of the claims as obvious because there was no reasonable expectation that a process combining prior art processes could be successfully scaled up in view of unchallenged evidence showing that the prior art processes could not be individually and successfully scaled up); *see generally In re Vaeck*, 947 F.2d 488, 493 (Fed. Cir. 1991) (reversing an obviousness rejection because the prior art did not disclose or suggest each claim limitation of the invention or convey a reasonable expectation of success).

The Examiner also incorrectly asserts that other ingredients, such as, proteins, chocolate and peanut butter, would "cover up bad tasting ingredients" and that "nothing new is seen in tweaking a composition, and varying the ingredients so that it will taste good." Examiner's 2nd Answer, p. 14. It is clear that the Examiner has ignored Mr. Rapp's testimony based on facts and unchallenged unscientific principles that it is infeasible to add fat to mask the negative taste of protein and fortification ingredients to

produce a good tasting energy bar of the present invention. *See* Rapp Declaration I, ¶¶ 15-19. *In re Oelrich*, 579 F.2d at 91 (Board’s refusal to accept expert testimony based on facts and technically sound applications of unquestioned physical principals was erroneous); *In re Soni*, 54 F.3d at 751 (holding that the Board of Patent Appeals and Interferences erred in maintaining the Examiner’s rejection of the claims as obvious because unexpected results is established when Applicant demonstrates substantially improved results, states in the specification that the results were unexpected, and there is no evidence to the contrary).

3. The Examiner Improperly Ignores Expert Testimony Regarding The Objective Indicia of Nonobviousness

The Examiner has once again erred by ignoring expert testimony regarding the indicia of nonobviousness, which include (1) the long felt need for a nutritious energy bar that tastes good, (2) the failure of others in developing such a product, (3) the unexpected results of the present invention and (4) the commercial success of the present invention. *See In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992); *Yamanouchi Pharm. Co. v. Danbury Pharmacal.*, 231 F.3d 1339, 1343 (Fed. Cir. 2000) (citing *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1566-67 (Fed. Cir. 1987) and *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966)); *KSR Int’l Co.*, 127 S. Ct. at 1727.

The Examiner asserts that “the claimed composition and process has been shown and it would have been obvious to make such a product as shown above.” Examiner’s 2nd Answer, p. 17. However, as explained above, neither the claimed composition and process have been shown nor is it obvious to make the product of the present invention. For arguments sake, even if a *prima facie* case of obviousness were

deemed to have been established, which is clearly not established in the present case, Applicants, through expert testimony explained the extraordinary hurdles that needed to be overcome to provide an excellent tasting energy bar, and provided evidence of secondary considerations, such as, unexpected results, commercial success, long felt need, failure of others, etc., which the Examiner has incorrectly ignored.

The Examiner is incorrect in dismissing without any reasonable basis Applicants' expert testimony by Mr. Rapp which confirms that there was a long felt need for products that satisfy consumers' desires for a nutritious energy bar that tastes good. *See* Rapp Declaration I, ¶ 6; Rapp Declaration II, ¶¶ 6-9. The Examiner also ignores the objective evidence presented by Mr. Rapp indicating that the invention satisfied long felt need (*see* Opening Brief, Evidence Appendix A; Rapp's Declaration II, ¶15 discussing the many awards won by one embodiment of the Applicants' invention, sold under the brand name SNICKERS MARATHON®); that the invention enjoyed commercial success (*see* Opening Brief Evidence Appendix B; Rapp's Declaration II ¶ 13, discussing the sales velocity of SNICKERS MARATHON®, which exceeded expectations); and that the commercial success of the invention is not simply due to marketing (*see* Rapp's Declaration II, ¶14). As Mr. Rapp pointed out, energy bars were introduced to consumers in the late seventies to early eighties. Rapp's Declaration I, ¶6. In the 30 years or so preceding the filing of the present application, despite several companies working with people skilled in the art on producing a good tasting nutritious energy bar, none of the energy bars produced had hedonic scores as high as those of the present invention. *See* Rapp's Declaration II, ¶14. This evidence is strong support for the patentability of the present claims.

D. The Rejection of Claims 11 and 12 As Allegedly Obvious
 Over Kelly in View of Froseth and Rombauer Is Not Supported

The Examiner has included this rejection under the heading “NEW GROUND(S) OF REJECTION.” This rejection is traversed for the same reasons as set forth in Applicants’ Brief dated December 21, 2007, the contents of which are incorporated by reference herein, and the arguments repeated in Section C above.

E. With Respect to the Rejection of Claims 23 and 24,
 the Examiner Misconstrues Avera

The Examiner also misconstrues Avera, which is not directed toward an energy bar, but rather a high fat melt nut butter and a process for making the nut butter. Avera, col. 1, ll. 3-4. In Avera, shelled, raw, blanched peanuts are roughly ground to form a slurry, the slurry is adjusted to the desired oil content, and the slurry is then finely ground so that at least 96% of the resulting smooth product will pass through a standard U.S. sieve of 200 mesh size (which the Examiner alleges to be a 75 micron size). *Id.* at col 1, ll. 59-60, and col 2, ll. 52-68. However, the Examiner asserts that, “It is not seen that the peanut particles of Avera cannot be used in an energy bar, particularly as peanut butter is known to be used in such and the particle size of the peanuts as claimed has been shown.” Examiner’s 2nd Answer, p. 17. The Examiner is incorrect because the final product in Avera is peanut butter, which clearly is *not* a protein powder. Also, since peanuts are almost half fat, a person skilled in the art looking to make a low fat energy bar with protein content as in the present invention would not look to add peanut butter of Avera as the source of protein.

The Examiner's assertion that, "Avera does teach applicants' particle size which would have to be in powder form to be that size" is plainly mistaken. *Id.* at p. 16. From the Examiner's erroneous statements it appears that the Examiner is considering the finely ground nut solids of the peanut butter to be equivalent to a protein powder. However, this is incorrect, since the nut solids are *not* "in powder form," but are simply finely ground peanuts. The fact that Avera "grinds [peanut] solids to a sufficiently small size to make a smooth product" such that at least 96% of the product passes through a 200 mesh screen is irrelevant to the present invention and does not make present claim 23 obvious.

In addition, for argument's sake, even if Avera's nut solids were a protein powder, which they clearly are not, Avera does not make present claim 24 obvious. The Examiner incorrectly asserts that "Avera discloses a nut butter with a particle size of 96% which would pass through a US sieve of 200 mesh size which is 75 microns, which leaves less than 10% having a particle size of less than 75 microns (col 2, lines 65 -70)." Examiner's 2nd Answer, pp. 12 and 16. First of all, if at least 96% of the nut butter passes through an allegedly 75-micron screen, that means that 4% or less of the nut butter has a particle size of greater than 75 microns. Also, there is no disclosure in Avera of the particle size profile of the nut butter that passes through the screen or that is retained by the screen, and a person skilled in the art cannot deduce data regarding the distribution of particle size just based on sieve data. Hence, there is no way of knowing whether "50% of the particles have a mean particle diameter in the range from about 35 to about 175 microns and less than 10% of the particles have a mean particle diameter in the range from about 10 to about 50 microns," as required by present claim 24. Therefore, the

Examiner's statement that "No patentable distinction is seen at this time in the sizes of less than 10% as most of the particle sizes are within the claimed range" is completely unfounded, as there is no factual basis or teaching in Avera for coming to this conclusion. Id. at p. 12.

F. *In re Levin* Does Not Support the Examiner's Rejections

The Examiner relies on *In re Levin*, 84 USPQ 232 (C.C.P.A. 1949), at page 8 of the Examiner's 2nd Answer to support her rejections. However, *In re Levin* makes clear that while simply mixing food components together may not support patentability, a showing that "establishes coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function," will. *In re Levin*, 84 USPQ at 234. The evidence in the present case has well established that prior to the present invention it was difficult to produce a good tasting energy bar having the nutritional characteristics required in an energy bar. Applicants have further established that the coaction or cooperative relationship between the claim recited components prepared by the processes described in the present application in fact meets a long felt need and produces an energy bar having excellent taste attributes despite the high levels of proteins, vitamins and minerals in a low fat environment. Accordingly, it is clear that the Examiner's reliance on *In re Levin* is unsupported.

G. Once The Cited Art Are Properly Construed, The Expert Testimony Is Not Discounted, And The Objective Indicia of Nonobviousness Are Given Proper Weight, The Art Rejections Are Not Applicable

As noted in Sections C and E above, the Examiner has not properly construed the cited art and has failed to take into account the expert testimony provided regarding the cited art and also in support of the objective indicia of nonobviousness. It is submitted that once these errors are corrected, the rejections based on the cited art fail to render the present claims obvious.

Specifically, the rejections based on the cited art are premised on the Examiner's erroneous allegation that it would have been within the skill of one in the art to combine the various ingredients of the food products of the cited art to produce a good tasting energy bar of the present invention. Examiner's 2nd Answer, p. 12. First, as discussed above, the Examiner has not provided explicit reasoning to support these conclusory statements. Second, the Examiner has failed to recognize that energy bars are a food category segment and their manufacture involves overcoming extraordinary hurdles. Third, the cited art do not describe energy bars or the manufacture of energy bars, and thus, were not faced with the problem solved by the present inventors. That which does not recognize the problem cannot render the solution to that problem obvious. *In re Clay*, 966 F.2d 656, 659-60 (Fed Cir. 1992) (reversing a finding of obviousness because the prior art did not deal with the problem the claimed invention solved).

In addition, as discussed in detail above and in the Opening Brief, once the cited art are properly construed, and proper weight is given to the expert testimony regarding the objective indicia of nonobviousness, then, contrary to the Examiner's assertion, it becomes clear that none of the cited art are analogous art; there is no

motivation to combine them; and any permissible combination of the cited art does not provide a reasonable expectation of success. Since the premise on which the rejections over the cited art are based is wrong, these rejections cannot be maintained.

It is respectfully submitted that the final rejection of the claims should be reversed for the reasons stated.

Respectfully submitted,

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